INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	5
Summary of argument	7
Argument: The court below, having upheld the validity of the Commission's order directing petitioner to cease and desist from further illegal price discriminations, properly rejected petitioner's motion asking the court to withhold entry of judgment of affirmance until petitioner's competitors can be subjected to like orders and judgments	9
Conclusion	19

CITATIONS

Cases:

Edelmann & Co. v. *Federal Trade Commission*, No. 101, this Term	16
Federal Trade Commission v. *Algoma Lumber Co.*, 291 U. S. 67	13
Federal Trade Commission v. *Niehoff & Co.*, No. 110, this Term	7, 9, 10, 11, 14, 15
P. & D. Manufacturing Co. v. *Federal Trade Commission*, No. 491, this Term	16
Scripps-Howard Radio v. *Federal Communications Commission*, 316 U. S. 4	11
Sorensen Manufacturing Co. v. *F. T. C.* (C. A. D. C.) 246 F. 2d 687	16
Whitaker Cable Corp. v. *Federal Trade Commission*, 239 F. 2d 253, certiorari denied 353 U. S. 938	16

Statute:

Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526: Page

Section 2 (a) (15 U. S. C. 13 (a)) 2, 5, 7

Section 2 (b) (15 U. S. C. 13 (b)) 2

Section 11 (15 U. S. C. 21) 3, 8, 10

Miscellaneous:

16 C. F. R. 1.3 (d) (1949) 13

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 77

MOOG INDUSTRIES, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 507–520) is reported in 238 F. 2d 43. The opinion of the Federal Trade Commission (R. 79–90), and the dissenting opinion of Commissioner Mason (R. 91–95), are reported in 51 F. T. C. 931.

JURISDICTION

The judgment of the Court of Appeals affirming the order of the Federal Trade Commission was entered on November 29, 1956 (R. 523), and its order denying petitioner's motion to hold entry of judgment in abeyance was entered on the same date (R. 522). The

petition for a writ of certiorari was filed on February 4, 1957. The petition was granted, limited to Question 4 presented by the petition, on March 25, 1957 (R. 525). 353 U. S. 908. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the court below erred in denying petitioner's motion to hold its judgment in abeyance until petitioner's competitors, using similar forms of volume discounts, are subjected to like judgments or orders.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *. * * *
>
> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price * * *, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section,

* * *: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, * * *.

Section 11 of the Clayton Act, 38 Stat. 734, as amended, 15 U. S. C. 21, provides in part:

> That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:
>
> Whenever the Commission * * * shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing * * *. * * * If upon such hearing the Commission * * * shall be of the opinion that any of the provisions of said sections

have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of section 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order. * * *

If such person fails or neglects to obey such order * * * the Commission or Board may apply to the United States court of appeals * * * for the enforcement of its order * * *. Upon such filing of the application and transcript the court * * * shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission or Board. The findings of the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission or Board, the court may order such additional evidence to be taken before the Commission or Board and to be adduced upon the hearing in such manner and upon

such terms and conditions as to the court may seem proper. * * *

Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside. * * * Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order, * * *.

The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

* * * * *

STATEMENT

The Commission in December 1949 filed a complaint charging that petitioner, which makes and sells certain types of automotive replacement parts, had been discriminating in price between different purchasers of products of like grade and quality in violation of Section 2 (a) of the Clayton Act (R. 1–3). Following the taking of evidence, the Commission's Hearing Examiner filed an "Initial Decision" (R. 59–77), and on appeal the Commission by a written opinion affirmed the Examiner's findings of fact, conclusion, and order (R. 79–90).

Petitioner's business is substantial[1] and it sells its products in every state. Its customers are jobbers, who resell to garages, service stations, fleet owners, and other jobbers. It sells its products under three classifications—coil action line, leaf spring line, and piston ring line—and sales of the first two have always predominated, with the piston ring line accounting for a small proportion of total sales. At the end of each year, it granted a retroactive rebate (usually referred to by petitioner as a "discount") based on the total volume of the year's purchases in each line. The rebates which it granted ranged from zero to 19% for the coil action line, from zero to 15% for the leaf spring line, and from zero to 20% for the piston ring line. (R. 60–63.)

Some of petitioner's sales have been to members of group-buying organizations. In such sales the jobber either ordered directly from petitioner or through the group office; petitioner shipped to the jobber but billed the group office, with which the jobber made settlement; and at the year's end petitioner paid the group office the rebate payable on the dollar volume of the total purchases made by its members, which rebate the group office divided among the members in the proportion of their individual purchases. The Commission found that this method of buying was a mere bookkeeping device to obtain for its members a higher rate of rebate (and consequent lower price) than given nonmembers. (R. 64–65.)

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[1] Petitioner states (Br. 7) that its gross business in 1952 was a little less than $5,000,000.

The Commission found that petitioner, by means of its annual volume rebates, discriminated in price between different purchasers, and that the effect of such discriminations may be substantially to lessen, injure, or destroy competition between customers of petitioner who compete with each other in the resale of its products (R. 67, 78). The Commission concluded that these price discriminations violated Section 2 (a) of the Clayton Act, and it entered an order that petitioner "forthwith" cease from selling replacement parts of like grade and quality to any one purchaser at net prices higher than the net prices charged to any other purchaser who in fact competed, in resales, with the purchaser paying the higher price (R. 76–77, 78). On review of this order, the court below, in an opinion by Whittaker, J., unanimously affirmed the order (R. 507–520).

Petitioner subsequently filed a motion which prayed the court "to set aside the opinion and judgment herein for the time being and hold the same in abeyance until the entire automotive replacement parts industry can be subjected to similar judgments and orders" (R. 521). This motion was denied without opinion (R. 522).

SUMMARY OF ARGUMENT

Since the question presented in this case is, in substance, discussed in the Commission's brief in *Federal Trade Commission* v. *Niehoff & Co.* (No. 110, this Term), we here adopt and rely on the views there expressed. The present brief deals with certain

matters common to both cases, but does so in relation to the facts of the instant case.

1. After the court below had upheld the validity of the Commission's order directing petitioner to cease from further illegal price discrimination, petitioner moved that the court hold its judgment of affirmance in abeyance until petitioner's competitors had been subjected to similar orders and judgments. The motion is premised on the proposition that in the review proceeding under Section 11 of the Clayton Act the court below possessed the same latitude, in limiting or conditioning grant of injunctive relief, exercised by a trial court of equity. The decisions of this Court establish, however, that on judicial review of administrative orders the reviewing court's powers are, generally speaking, confined to correcting errors of law committed by the agency. Petitioner shows no reason for taking this case out of the general rule, a departure from which would give judicial countenance to continuation of an adjudicated violation of a regulatory statute.

A further decisive barrier to the grant of petitioner's motion is that it is based upon facts not supported by any finding made by the Commission. Under the statute, however, fact-finding is the exclusive province of the Commission and a reviewing court has no independent power in that respect.

2. In form, petitioner's motion to hold judgment in abeyance merely requests that entry of judgment be deferred. In practical effect, grant of the motion would bar entry of judgment for all time. Grant of the motion would mean that the Commission, in

order to have the judgment become alive, would have to investigate all facts relevant to determining who are petitioner's significant competitiors, each such company's pricing practices, and the effect of its price differentials upon competition among its customers. It would mean that, following such investigation and appraisal of the facts developed, the Commission would have to undertake an indeterminate number of administrative proceedings and subsequent judicial review proceedings. In view of the Commission's limited staff and funds, this burden would be, if not practically impossible, at least not in the public interest.

In addition, the court below, although vested with no supervisory power over the Commission's administration of the regulatory statute being enforced, would sit in judgment upon the adequacy of the Commission's handling of the exceedingly complex problems incident to meeting the conditions precedent to entry of a judgment of affirmance. We submit that this would be nothing more than judicial intrusion upon the performance of purely administrative functions.

ARGUMENT

THE COURT BELOW, HAVING UPHELD THE VALIDITY OF THE COMMISSION'S ORDER DIRECTING PETITIONER TO CEASE AND DESIST FROM FURTHER ILLEGAL PRICE DISCRIMINATIONS, PROPERLY REJECTED PETITIONER'S MOTION ASKING THE COURT TO WITHHOLD ENTRY OF JUDGMENT OF AFFIRMANCE UNTIL PETITIONER'S COMPETITORS CAN BE SUBJECTED TO LIKE ORDERS AND JUDGMENTS

In this case and in *Federal Trade Commission* v. *Niehoff & Co.* (No. 110, this Term), a court of

appeals, reviewing pursuant to Section 11 of the Clayton Act an order of the Federal Trade Commission directed against illegal price discrimination, upheld the validity of the Commission's order. In *Niehoff* the court, notwithstanding its determination that the order was valid, modified it by eliminating the requirement that Niehoff "forthwith" cease from further violation of the statute and substituted the provision that the order take effect at such future time as the court may direct, to be determined by the future course of the Commission's proceedings against Niehoff's competitors. In the instant case, petitioner sought to achieve a like end by asking the court below to hold in abeyance its judgment affirming the Commission's order "until the entire automotive replacement parts industry can be subjected to similar judgments and orders" (R. 521).

In *Niehoff* the question presented is the validity of the court's modification of the Commission's order, and here the question presented is the validity of the court's refusal to postpone entry of judgment. Although the cases involve differing methods for achieving deferment of enforcement of a valid Commission order, certain questions are common to each case. One is whether the reviewing court in a Section 11 proceeding is clothed with all of the powers of a trial court of general jurisdiction. Other common questions are whether the order of an administrative agency directed against an adjudicated violation of a regulatory statute is enforceable if the agency has not yet proceeded against all other similarly circum-

stanced potential violators of the statute, and whether postponement of enforcement (either by modifying the agency's order or by withholding entry of a decree of affirmance) constitutes unwarranted substitution of the court's judgment for that of the Commission as to the appropriate and requisite remedy. The Commission's views on these questions are set forth in its brief in the *Niehoff* case, and we adopt the views and contentions there made without restatement.[2]

I

Petitioner's basic contention (Br. 11-16) is that in a Section 11 proceeding the reviewing court possesses the same latitude as a trial court of equity in determining whether to grant or withhold judicial relief. Although the Commission's *Niehoff* brief discusses this contention, further elaboration in the light of the facts of the instant case seems desirable.

This Court has ruled that judicial review of administrative orders is, generally speaking, limited to determining whether the agency has committed an error of law and that the reviewing court "exhausts its power when it lays bare a misconception of law and compels correction." *Scripps-Howard Radio v. Federal Communications Commission*, 316 U. S. 4, 10. Here the court below, having found that no error of law had been committed, had no basis for the exercise of its statutory power to "set aside" or "modify" the Commission's order, and there was left only the

[2] Copies of the Commission's *Niehoff* brief have been served on petitioner's counsel.

statutory power and duty to "affirm". If the court has authority to do otherwise, there must be read into the words of the statute defining the court's jurisdiction a latent or inherent power on the part of the court to determine that special and unusual circumstances make enforcement of the regulatory statute so harsh or inequitable that the court should permit continuation of an adjudicated violation of law.

While we believe that the grant of power to "affirm" is not equivalent to a power to withhold affirmance, at the very least the circumstances which would support exercise of the latter power (assuming that it exists) must be factually established in the manner provided by the statute authorizing judicial review. But it is settled that, under the statute, fact-finding is the exclusive province of the Commission and a reviewing court has no independent fact-finding power.

Petitioner's motion to hold judgment in abeyance rests on certain alleged facts, *i. e.*, that immediate entry of judgment would cause petitioner "certain financial loss" and that "the quantity discount pricing system is part and parcel of the whole automotive replacement parts industry" (R. 521). No such facts were found by the Commission, nor do its findings even permit an inference of such facts. Accordingly, petitioner's motion necessarily asked the court to undertake fact-finding, which, under the statute, it is not empowered to do.[3] In passing upon the validity of an

[3] Likewise, the jurisdiction given the reviewing court is "to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript [of the Commission proceeding] a decree affirming, modifying, or setting aside the order of the Commission" (*supra*, p. 4).

order of the Federal Trade Commission, it is error for the reviewing court "to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision (*Federal Trade Comm'n* v. *Pacific States Paper Trade Assn*, 273 U. S. 52, 61, 63) forbid that exercise of power." *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73.

The very evidence which petitioner brings to the attention of this Court under the heading "The Testimony in the Record Plainly Shows the Necessity of Equitable Relief" (Br. 16–17) illustrates the dangers inherent in the judicial fact-finding necessarily involved in the grant of petitioner's motion. The testimony set forth which is most favorable to petitioner is merely that its "competitors' pricing structures are similar to our own," that since 1935 there has been "a general practice in the marketing of pistons to grant a cumulative retroactive rebate," and testimony by one Ramel which is confined to the piston ring field (R. 499–502).[4] Certainly such evidence falls far short of a conclusive or convincing showing of the facts on which petitioner based its motion to hold judgment in abeyance.[5]

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[4] The Commission found that petitioner's piston ring line accounted for only "a small proportion" of its overall sales (R. 61).

[5] Following the decision by the court below, Sealed Power Corporation, one of petitioner's principal piston ring competitors (R. 462, 501), was willing to become bound by a Commission order against price discrimination substantially identical with the order issued against petitioner, notwithstanding that its competitors (apart from petitioner) were not so bound. See Commis-

II

We also wish to elaborate, in relation to the facts in this case, another matter touched upon in our *Niehoff* brief (p. 15)—namely, that to make enforcement of the Commission's order contingent upon subjecting all "competitors" to similar orders and judgments would preclude for all time, not merely defer for an indefinite time, enforcement of the order. Petitioner's motion asked the court below to defer entry of judgment "until the entire automotive replacements parts industry can be subjected to similar judgments and orders." The motion thus makes the clearly erroneous assumption that every member of the so-called "industry" is a competitor of petitioner. See *infra*, pp. 16–17. But even if petitioner is now prepared to treat as competitors only those who sell automotive replacement parts of the kind sold by petitioner, the administrative task of subjecting all such competitors to similar orders and judgments would be so prolonged and difficult as to be a practical impossibility, having due regard for the Commission's other statutory duties. We indicate below the scope and difficulties of this administrative task.

Petitioner sells its products under three classifications, leaf spring line, coil action line, and piston ring line (R. 61). In each line petitioner has a different set of competitors (R. 451–452, 462, 501). Moreover, the leaf spring line includes leaf springs, coil springs, tie rod ends, shackles, and kingbolts (R. 61), and pe-

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sion order entered by consent on May 3, 1957. *In the Matter of Sealed Power Corporation*, F. T. C. Docket 6654.

titioner has one one set of competitors in leaf springs, another in coil springs, and still another set in tie rod ends, kingbolts, and shackles (R. 452). In leaf springs, one subdivision of one of petitioner's three lines, there are, in addition to numerous concerns of approximately petitioner's size, at least 10 or 12 "just of a local nature," and still other spring service stations who "do some manufacturing and distribution on their own" (R. 451).

The grant of petitioner's motion to hold judgment in abeyance would mean that the Commission, in order to be in a position to obtain entry of judgment, would have to determine: (1) who are petitioner's significant competitors; (2) the pricing practices of each; and (3) the effect of each company's price differentials upon competition among its customers, which effect would involve the question whether the seller had two or more distributors (competing in resale) in particular trade areas (cf., finding 16, R. 67). It would also mean court scrutiny and determination of the Commission's proper performance of this task, *i. e.*, whether it had adequately investigated all pertinent facts as to petitioner's competitors and whether, in the instances in which the Commission decided that there were insufficient grounds to issue a complaint, this decision was warranted. The court would thereby, in substance, exercise supervision over, and intrude upon, duties and functions which are purely administrative. See our *Niehoff* brief, pp. 10, 21. Finally, entry of judgment against petitioner would have to await not only completion of the administra-

tive proceedings on all issued complaints but also judicial affirmance of the cease and desist orders resulting from these proceedings.

III

While the point is, in our view, not relevant, we note petitioner's statement that denial of its motion to defer entry of judgment defeats the very purpose of the Robinson-Patman Act, protection of a small business against its larger competitors (Br. 9–10, 20), as well as the related statement that petitioner's 1952 gross business was less than 1% of the 1952 gross business of the "automotive replacement parts industry" (Br. 7, 17). The implication is that the Commission unfairly proceeded against one minor member of a vast "industry".

Automotive replacement parts are sold under as many as 75 lines (R. 71), and petitioner sells only three lines (*supra*, p. 6). Sellers of wholly unrelated products are not competitors, and we cite below, to illustrate the diversity of products used as automotive replacement parts, the lines sold by companies against which the Commission has issued cease and desist orders which have been judicially reviewed.[6] There plainly is no automotive replace-

[6] Ignition line, hydraulic line, testing equipment line (*Viehoff*); brass line, glass line, brake line (*Edelmann & Co.* v. *F. T. C.*, No. 101, this Term); ignition line, fuel line (*P. & D. Manufacturing Co.* v. *F. T. C.*, No. 491, this Term); cable and related parts (*Whitaker Cable Corp.* v. *F. T. C.*, 239 F. 2d 253 (C. A. 7), certiorari denied 353 U. S. 938)); ignition line, carburetor line, cable line (*P. Sorensen Manufacturing Co.* v. *F. T. C.*, 246 F. 2d 687 (C. A. D. C.)).

ment parts "industry" in any sense of significance to the present proceeding, and we submit that comparison of the sales volume of petitioner with that of the entire "industry" is as empty of meaning and significance as comparison of petitioner's sales volume with that of the entire steel industry or entire automobile industry.

IV

Petitioner refers (Br. 21) to one instance in which the Commission, after judicial affirmance of an order issued under Section 2 (e) of the Clayton Act against a seller of cosmetics, deferred the time for filing a certificate of compliance with its order until disposition of like orders against other cosmetic companies. In that instance, the Commission was exercising the discretion vested in it respecting determination of the time at which its order shall become effective. But a reviewing court is vested with no like discretion to nullify the administrative agency's determination as to an order's effective date. Moreover, this one instance of deferment of enforcement is no indication that the Commission recognizes that, notwithstanding the public interest in achieving compliance with statutory requirements, compliance should invariably be delayed until all other like violators can be required to comply. The Commission's experience in the instance cited may well have led it to conclude that this kind of deferment of enforcement is, as a general matter, neither sound nor in the public interest.

We submit that is is also irrelevant that the Commission did not act upon petitioner's application for a Trade Practice Conference (see Pet. Br. 22–23). There is no showing that the application for such a conference was joined in by a sufficient segment of the so-called "industry" to warrant holding the requested conference. In addition, the Commission's rules barred grant of petitioner's application, which was made after the examiner had rendered his Initial Decision that petitioner had been violating the Clayton Act (R. 59, 76). The Commission's Rules of Practice and Procedure then in effect provided (16 C. F. R. 1.3 (d) (1949)): "But it is not the policy of the Commission to grant the privilege of settling cases through trade practice conference or stipulation agreements to persons who have violated the law where such violations involve * * * violations of the Clayton Act." Explanatory Statement (i), which follows the above section of the rules, also states: "Trade practice conference rules may include rules against restraints of trade and against violations of the Clayton Act. * * * They should not be accepted, however, as a basis for the settlement of cases in which the Commission has reason to believe that such violations have occurred."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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